
STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CITIZENS UTILITY BOARD)
)
Complaint requesting the ICC to order)
Peoples Energy Services to cease)
and desist misleading marketing)
of Gas offering.)

Docket No. 03-0592

**BRIEF ON EXCEPTIONS OF
THE STAFF OF THE ILLINOIS COMMERCE COMMISSION**

**JOHN C. FEELEY
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago Illinois, 60601
(312)-793-2877**

**Counsel for the Staff of the
Illinois Commerce Commission**

January 29, 2004

NOW COMES the Staff of the Illinois Commerce Commission (“Staff” and “Commission”) and, pursuant to Section 200.830 of the Illinois Commerce Commission Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits this brief on exceptions to the Administrative Law Judge’s (“ALJ”) Proposed Order (“PO”) issued on January 22, 2004.

I. Exceptions

- A. The PO sets a bad precedent by considering the Agreement to be part of the marketing material.

Argument

Peoples Energy Services Corporation’s (“PESCO”) mailing to customers on September 8, 2003 consisted of two items, an offer letter and an Agreement. (PO, p. 1) The PO states that both the offer letter and the Agreement were part of the marketing material. (PO, p. 15) The Commission should adopt Staff witness Howard’s position that only the offer letter and not the Agreement should be considered when determining whether PESCO violated Section 19-115(f) of the Alternative Gas Retail Supplier Act (“AGS Act”) (220 ILCS 5/19/100 *et seq*). Subsection 19-115(f)(1) states as follows:

Any marketing materials which make statements concerning prices, terms, and conditions of service, shall contain information that adequately discloses the prices, terms and conditions of the products or services.

As Staff witness Howard testified it’s the offer letter not the Agreement that attracts customers for PESCO. (Staff Ex. 1.0, p. 4). Acceptance of PESCO’s argument that the Agreement and the offer letter are part of the marketing material to be considered under Section 19-115(f) would set a bad precedent. PESCO’s position in effect makes the offer letter irrelevant. In the future, gas suppliers may not adequately disclose the

prices, terms and conditions in the offer letter because they attached the Agreement to the offer letter. Also, gas suppliers could make egregious statements in their offer letters knowing that they could renege on any promises made in the offer letter so long as they included an Agreement with the offer letter. Adoption of PESCO's position will only lead to customer dissatisfaction and undermine consumer confidence.

Proposed Modification
(PO, pp.15-16)

* * *

While we disagree with Staff that all terms, especially, routine contractual provisions, must be in the offer letter, as well as in the Agreement, we are persuaded by Ms. Howard's argument that only PESCO's. Both the offer letter and the Agreement were should be considered to be part of PESCO's marketing materials with respect to Section 19-115(f). PESCO sought new customers with the offer letter and not with the Agreement. PESCO must accept responsibility under the AGS Act for its failure to provide adequate information in its offer letter. By claiming that the Agreement fully disclosed all the relevant terms and conditions PESCO is trying to avoid liability under the AGS Act. Acceptance of PESCO's position would make the offer letter in effect irrelevant. If PESCO's position were adopted, alternative gas suppliers may not adequately disclose the prices, terms and conditions in the offer letter because the offer letter had the Agreement attached to it. Also, gas suppliers could make egregious statements in their offer letters knowing that they can renege on those statements so long as they attached an Agreement to the offer letter. Customers would not be well served by adopting PESCO's position. Customers would become dissatisfied and lose confidence in the market. Moreover, Nothing prohibits PESCO from further clarifying or defining what is in the offer letter in the Agreement, with the caveat that provisions that are in technical terms, which are not readily discernable to the average person, do not sufficiently advise that person as to what is being disclaimed. (*Siegel v. The Levy Organization*, 153 Ill. 2d 534, 544, 607 N.E.2d 194 (1992)). Also, any further clarification must not be "hidden" in those materials. (*Id.*).

However, as will be set forth below, when taken in toto, some provisions in the Agreement or in the offer letter, even as modified by the December 11, 2003 letter, and by Ms. Ito's representations, do not provide "adequate disclosure" of certain material provisions regarding the prices, terms and conditions of the offer service PESCO provides. Also, In addition, some material provisions in the Agreement are not in conformance with the pertinent contract law. PESCO cites no law requiring this Commission to accept provisions that do not conform with existing law, even if those conditions are adequately disclosed. Nor could it. (See, e.g., *Coronet Insurance Company v. Ferrill*, 134 Ill. App. 3d

483, 485-88, 481 N.E.2d 43 (1st Dist. 1985), ruling that contractual provisions that are not in conformance with the law are not enforceable.).

* * *

- B. The December 11, 2003 letter is irrelevant for determining whether PESCO complied with the AGS Act.

Argument

The PO at page 17 concludes that PESCO did comply with the AGS Act with respect to Billing Options and Payment Options. (PO, p. 17) That conclusion is based upon the faulty premise that the letter sent by PESCO on December 11, 2003 should also be considered as part of the marketing material when determining whether PESCO met the requirements of Section 19-115. The only relevant document for the Commission to consider when deciding whether PESCO complied with Section 19-115 is the offer letter. As discussed above, the Agreement is not relevant and certainly not a letter sent to customers subsequent to the filing of the Citizens Utility Board's ("CUB") complaint. The December 11, 2003 letter is only relevant for determining whether it is necessary for the Commission to issue an order requiring PESCO to adequately inform customers of the prices, terms and conditions of its service. (PO, p. 19)

Proposed Modification (PO, p. 17)

Analysis and Conclusions

PESCO mentioned payment option in the offer letter, ~~but—~~ Nowhere in the offer letter ~~or in the Agreement~~ is there any mention of what those payment options are. The fact that PESCO mentioned payment options in the offer letter is some indicia that PESCO viewed payment options as important enough to induce potential customers to purchase its service. ~~However, the above cited language in the December 11, 2003 letter clarifies what the payment options are for a consumer.~~ In the December 11, 2003, letter, PESCO also finally advised its

customers as to the fact that their bills could be due within ten days, instead of 21 days, which are, the billing options. While ~~t~~The December 11, 2003, letter did advises customers of those facts needed when deciding whether to purchase the product offered by PESCO, it is not relevant for determining whether PESCO's offer letter complied with the AGS Act. Therefore, w~~We~~ find that the circumstances, ~~in toto~~, establish noncompliance with the AGS Act. However, given the December 11, 2003 letter there is no need to issue an order requiring PESCO to further disclose the payment options.

* * *

- C. The PO needs further clarification that PESCO violated the AGS Act with respect to the price of gas.

Argument

The PO states that PESCO's offer letter misled consumers with respect to the price of gas. (PO, p. 19) In addition, although not relevant the PO states that even the Agreement failed to adequately disclose the price of gas. The PO goes on to state that finally in its December 11, 2003 letter PESCO adequately disclosed price and 11% of the customers dropped PESCO as a supplier once they were fully informed. As mentioned previously the December 11, 2003 letter is not relevant for determining whether PESCO complied with the AGS Act. Despite all of this, the PO fails to state that PESCO did not comply with the AGS Act with respect to "the Price of Gas". So that there is no doubt about this issue the Commission's order should clearly state that PESCO violated the AGS Act with respect to the "Price of Gas."

Proposed Modification (PO, p. 19)

Analysis and Conclusions

The offer letter misled consumers, as it did not disclose those charges that were in addition to the \$.62 per therm for gas. The additional charges not disclosed include the monthly administrative fee which is mentioned in ~~While~~ the

~~Agreement advised consumers, in a somewhat easy to spot manner, of the monthly administrative fee, the amount of, or what are, and the cost-pass-through charges that were not explained anywhere in the offer letter or in the Agreement.~~

~~However, PESCO's issuance of the letter of December 11, 2003, finally adequately explained these cost pass through charges that are in addition to the \$.62 per therm. As already discussed the December 11, 2003 letter is not relevant for determining whether PESCO complied with the AGS Act. The fact that Approximately 11% of the customers on the program cancelled their Agreements with PESCO further supports the conclusion that PESCO did not adequately disclose what the . This is some indicia that the actual charges were going to be for customers. Therefore, we find that PESCO's offer letter (i.e. the September 8, 2003 letter) did not comply with the AGS Act. imposed by PESCO were adequately explained, albeit for the first time, in the December 11, 2003, letter. Therefore, However, there is no need to issue an order requiring PESCO to disclose the actual charges given the December 11, 2003 letter.~~

~~PESCO argues, essentially, that because Ms. Ito stated that customers will not receive a new pricing notice during the term of the Agreement, customers will not be harmed by the provision in the Agreement that allows PESCO to change the price of gas. PESCO is correct that the December 11, 2003, letter and Ms Ito's averment, under oath rectify the deficiencies its initial offer letter and Agreement.~~

~~* * *~~

D. PESCO did not comply with 83 Ill Adm. Code Sec. 550.30(c)

Argument

Staff respectfully disagrees with the PO's conclusion that PESCO complied with 83 Ill Adm. Code Sec. 550.30(c). The PO fails to recognize the importance of the fact that the Peoples Gas Logo appeared on the offer letter and not the Agreement. In order to carry out the intent of the Commission's rule regarding affiliate disclaimers the disclaimer should have appeared at a minimum on the same side of the marketing document e.g. the offer letter where the logo appeared. Adoption of the Company's position would lead to the absurd result where disclaimers would appear numerous

pages after the page on which the utility logo appeared with the end result of customers being misled.

Proposed Modification
(PO, p. 27)

* * *

83 Ill. Adm. Code Sec. 550.30(c) requires PESCO, when it markets or advertises to the public using as an affiliated interest of Peoples Gas's name or log, to include a legible disclaimer ~~in every marketing or advertising material that~~ states:

* * *

Proposed Modification
(PO, p. 29)

Analysis and Conclusions

~~The offer letter on which the PESCO logo appeared did not contain. The initial offering included a legible disclaimer, such as could be found at the bottom of the Agreement, which disclosed that PESCO is not the same company as Peoples Gas, a statement that it was not regulated by the Commission, and a statement that a consumer need not buy products or services from Peoples Energy Services in order to receive the same quality service from Peoples Gas. This disclaimer in the Agreement did not comply with 83 Ill. Adm. Code Sec. 550.30(c). The disclaimer needs to appear where ever the logo appears in the marketing or advertising. As discussed above the Agreement was not part of PESCO's marketing materials. While Staff maintains that the disclaimer should have been in the offer letter, it was clearly a part of the offer, in a segregated, easy-to-spot portion of the Agreement, at the very bottom. PESCO's marketing materials included the Agreement and we decline to make PESCO recite that which is evident in one part of an offer in another. This is especially true in this case, as the Agreement is the backside of the offer letter.~~

However, In addition, PESCO did not voice a disclaimer in its oral marketing materials, unless the person marketed actually bought PESCO's product. While PESCO maintains that it only solicited (by phone) persons to whom it had previously mailed the Agreement, PESCO personnel did know whether the persons solicited had ever read the Agreement. (Tr. 70). PESCO is required, in the future, to include a disclaimer in any marketing materials, at the point of marketing, not at the point of sale. Customers must know, when marketed, with whom they are dealing. Otherwise, the purpose and intend of 83 Ill. Adm. Code 550.30(c) is circumvented.

* * *

- E. Staff's successes working with PESCO on its December 11, 2003 letter should not be overlooked.

Argument

The PO is clear that PESCO by working with Staff on its December 11, 2003 letter made it unnecessary for the Commission to issue an order directing PESCO to further clarify certain terms of its original offer letter. Yet inexplicably the PO states that the success of PESCO and Staff working together was "marginal at best." Staff finds this statement to not be supported by the record and therefore recommends that the whole paragraph in which the statement appears be deleted from the PO.

Proposed Modification
(PO, p. 33)

* * *

~~The record establishes that, throughout the course of this litigation, PESCO engaged, on a constant basis, to improve that which was set forth in the offer letter and the Agreement. And finally, the fact that PESCO has attempted to work with Staff throughout the course of this proceeding, with marginal success, at best, is an indication that issuing an order requiring PESCO to work with Staff with regard to all of its future marketing materials, could yield the same results.~~

* * *

- F. To prevent further customer dissatisfaction the Findings and Ordering Paragraph number five needs to be modified.

Argument

While Staff supports PO's decision that PESCO should notify customers of its violation the AGS Act, Staff believes to remedy the customer dissatisfaction which will result from the customers learning that PESCO violated the AGS Act, customers should be allowed if they so choose to cancel their agreement with PESCO without penalty for

a period of 30 days starting from issuance of the notice. In addition, the Commission should specifically direct PESCO how that notice should read rather than relying upon PESCO to develop on its own an adequate notice.

Proposed Modification
(PO, p. 35)

* * *

- (5) Peoples Energy Services Corporation shall issue a notification within ten (10) days of the date of this Order to all of its existing customers who accepted the offer that is the subject of this docket, that the Commission has determined that its practices, as set forth herein, violate Illinois law. ~~Peoples Energy Services Corporation must also include in this notification as to why the Commission determined that its practices violate Illinois law~~ The exact wording of the notice is set forth below.

The Illinois Commerce Commission in ICC Docket 03-0592 has found that Peoples Energy Services Corporation violated Illinois law regarding its current natural gas Agreement with you. Peoples Energy Services failed to adequately disclose the price, terms, and conditions of its offer in its marketing material. If you wish to cancel your Agreement with no early termination fee, please call (PESCO toll-free number) or complete and mail the cancellation form by (specify date = 30 days from the date of notice);

* * *

II. CONCLUSION

WHEREFORE, for the reasons set forth above, the Staff of the Illinois Commerce Commission respectfully requests that its modifications to the Administrative Law Judge's Proposed Order be adopted.

Respectfully submitted,

JOHN C. FEELEY
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago Illinois, 60601
(312)-793-2877

Counsel for the Staff of the
Illinois Commerce Commission

January 29, 2004